Teo Chee Kong v Public Prosecutor and other appeals

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NOS S-06A-5–01 OF 2018, S-06A-7–01 OF 2018, S-06A-8–01 OF 2018, S-06A-13–04 OF 2018, S-06A-14–04 OF 2018 AND S-06A-18–06 OF 2018

YAACOB MD SAM, RAVINTHRAN AND GHAZALI CHA JJCA

15 DECEMBER 2021

Criminal Procedure — Application for stay — Stay of execution pending appeal — Appeal to Federal Court — Applicant argued that failure to grant stay would render his appeal nugatory — Whether applicant failed to show special circumstances to warrant a stay — Whether applicant could not show that failure to grant stay would cause him irreparable damage, prejudice and miscarriage of justice

On the respondent's application under s 56 of the Anti-Money Laundering Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ('the AMLA'), the High Court made conditional forfeiture orders ('CFO') against certain properties ('the properties') owned by the appellant. The Court also granted a prohibitory order ('PO') preventing the appellant from dealing in any way with the properties. Thereafter, the appellant was charged in the sessions court on several charges under s 4(1)(a) and (b) of the AMLA. Following the institution of the charges, the appellant applied to the High Court to refer 12 constitutional questions of law affecting his case to the Federal Court ('FC') for determination pursuant to s 84 of the Courts of Judicature Act 1964. The High Court dismissed the application. The appellant then appealed to the Court of Appeal ('COA') not only against the said dismissal but also against the making of the CFO and the PO. The COA affirmed the PO and the dismissal of the reference to the FC but set aside the CFO and ordered the application for the forfeiture of the properties to be remitted back to the High Court for re-hearing before another judge. Pending the hearing by the FC of his appeal against the COA's decision, the appellant applied to the COA to stay its order affirming the PO.

Held, unanimously dismissing the stay application:

(1) The court had to be satisfied that there were special circumstances to warrant a stay of proceedings. What amounted to special circumstances depended very much on the factual circumstances of a case (see para 30).

(2) The appellant's only argument was that if the stay was not granted, it would render his appeal to the Federal Court nugatory or academic. The

appellant failed to convince the court that he would suffer any irreparable damage, prejudice or miscarriage of justice if the stay was not granted (see paras 31–32 & 38).

(3) It was only fair and just that the prohibitory order was issued in this case to prevent the appellant from dealing with the properties as they were the subject matter of the criminal proceedings against him (see para 37).

[Bahasa Malaysia summary

Mengenai permohonan responden di bawah s 56 Akta Pencegahan Pembiayaan Keganasan Pencegahan Pengubahan Wang Haram dan Hasil Daripada Aktiviti Haram 2001 ('AMLA'), Mahkamah Tinggi membuat perintah pelucuthakan bersyarat ('PPB') terhadap hartanah tertentu ('hartanah tersebut') yang dimiliki oleh perayu. Mahkamah juga memberikan perintah larangan ('PL') yang menghalang perayu daripada berurusan dengan apa-apa cara terhadap hartanah tersebut. Selepas itu, perayu telah didakwa di mahkamah sesyen atas beberapa pertuduhan di bawah s 4(1)(a) dan (b) AMLA. Lanjutan daripada pengemukaan pertuduhan, perayu memohon kepada Mahkamah Tinggi untuk merujuk 12 persoalan perlembagaan undang-undang yang melibatkan kesnya kepada Mahkamah Persekutuan ('MP') untuk ditentukan menurut s 84 Akta Mahkamah Kehakiman 1964. Mahkamah Tinggi menolak permohonan tersebut. Perayu kemudiannya merayu kepada Mahkamah Rayuan ('MR') bukan sahaja terhadap penolakan tersebut tetapi juga terhadap PPB dan PL. MR mengekalkan PL dan menolak semakan kepada MP tetapi mengetepikan PPB dan memerintahkan permohonan untuk pelucuthakan hartanah tesebut dihantar semula ke Mahkamah Tinggi untuk dibicarakan semula di hadapan hakim lain. Sementara menunggu pendengaranrayuannya oleh MP terhadap keputusan MR, perayu memohon MR untuk menggantung perintahnya yang mengekalkan PL.

Diputuskan, sebulat suara menolak permohonan penggantungan:

(1) Mahkamah harus berpuas hati bahawa terdapat keadaan khas untuk mewajarkan penggantungan prosiding. Apa yang disebut sebagai keadaan khas sangat bergantung pada keadaan fakta sesuatu kes (lihat perenggan 30).

(2) Satu-satunya hujah perayu adalah sekiranya penggantungan tersebut tidak dibenarkan, ia akan menyebabkan rayuannya ke Mahkamah Persekutuan sia-sia atau akademik. Perayu gagal meyakinkan mahkamah bahawa beliau akan mengalami sebarang kerugian yang tidak boleh diperbaiki, prejudis atau ketidakadilan sekiranya penggantungan tersebut tidak dibenarkan (lihat perenggan 31–32 & 38).

(3) Ia adalah adil dan saksama bahawa perintah larangan telah dikeluarkan dalam kes ini untuk menghalang perayu daripada berurusan dengan

hartanah tersbut kerana ia adalah perkara utama prosiding jenayah terhadapnya (lihat perenggan 37).]

Cases referred to

Dato' Seri Anwar bin Ibrahim v PP [1999] 1 MLJ 321, CA (refd)
Gan Boon Aun v PP [2016] 4 MLJ 265, FC (refd)
Government of Malaysia v Datuk Haji Kadir Mohamad Mastan and another application [1993] 3 MLJ 514, HC (refd)
Kosma Palm Oil Mill Sdn Bhd & Ors v Koperasi Serbausaha Makmur Bhd [2004] 1 MLJ 257, FC (refd)
Letchumanan a/l Suppiah v PP and another appeal [2009] 5 MLJ 597; [2009] 5 CLJ 652, FC (refd)
PP v Dato' Sri Mohd Najib bin Hj Abd Razak [2019] 4 MLJ 421, FC (folld)
Pendakwa Raya lwn Tetuan Wan Shahrizal, Hari & Co dan satu lagi [2019] MLJU 1645; [2019] 1 LNS 1104, HC (refd)
Rosengrens Ltd v Safe Deposit Centres Ltd [1984] Lexis Citation 219, CA (refd)
Saad bin Abas & Anor v PP [1999] 1 MLJ 129, CA (refd)
Sharma Kumari a/p Oam Parkash v PP [2000] 6 MLJ 847, HC (refd)
Smith, Hogg & Co Ltd v The Black Sea and Baltic General Insurance Co Ltd (1940) 162 LT 11 (refd)

Legislation referred to

Anti-Money Laundering and Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ss 4(1)(a), 1(b), 56
Courts of Judicature Act 1964 ss 3, 50, 50(2), 84, 89
Federal Constitution art 8
Rules of the Federal Court 1995 rr 78, 137

Appeal from: Criminal Application Nos BKI-44–29/7 of 2017, BKI-44–16/7 of 2017, BKI-44–30/8 of 2017, BKI-44–1/2 of 2018, BKI-43–6/2 of 2018 and BKI-44–9/5 of 2018 (High Court, Kota Kinabalu)

Cheng Ho Wan @ Roland (Roland Cheng & Co) for the appellant/applicant.
Mohd Sophian bin Zakaria (Allan Suman Pillai with him) (Deputy Public Prosecutor, Malaysian Anti-Corruption Commission) for the respondent.

Ghazali Cha JCA:

PRELUDE

[1] The applicant filed a notice of motion pursuant to s 89 of the Courts of Judicature Act 1964 ('the CJA 1964') and rr 78 and 137 of the Rules of the Federal Court 1995 ('the ROFC 1995') for an order of stay of the Court of Appeal order dated 23 November 2020 ('COA order') which affirmed the High Court prohibitory order dated 13 December 2017 pending the disposal

of the applicants' appeal in the Federal Court Criminal Appeal vide the appeal No 05(L)-18–01 of 2021(S) and five other appeals.

[2] After scrutinizing the written submission submitted by counsels for applicant and respondent and their respective oral submissions, it is the unanimous decision of the Court of Appeal that there are no merits in the applicants' application. We handed our reasoning hereinbelow.

THE SALIENT PROCEDURAL FACTS

[3] It is pertinent to appreciate the background facts before this motion.

[4] The applicant had explained the background facts in its written submission. We reproduce the background facts based on the written submission.

[5] On 11 July 2017, the respondent had filed an application vis a vis the forfeiture of property without prosecution under s 56 of the Anti-Money Laundering and Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ('the AMLA 2001') in the High Court against the applicant's monies in 67 bank accounts.

[6] In the meantime, the respondent also filed a separate forfeiture proceeding in the High Court against 65 pieces of lands in Sabah which were held by the applicant vide the High Court Criminal Application No BK1-44(A)-30/8 of 2017.

[7] Conditional forfeiture orders ('conditional forfeiture orders) dated 13 December 2017 were granted by the High Court against both the bank accounts and the lands.

[8] Two hours after the delivery of the said conditional forfeiture orders, at the same day, the applicant was charged with a total of 146 accounts of charges in the sessions court pursuant to s 4(1)(a) and (b) of the AMLA which overlapped with the same assets in the banks and lands.

[9] Sequel to the institution of the 146 accounts of charges against the applicant, the applicant applied to the High Court for reference of 12 constitutional questions to the Federal Court pursuant to s 84 of the CJA 1964.

[10] The said application was dismissed by the High Court on 6 June 2018 ('s 84 HC order').

[11] Dissatisfied with the decision, the applicant filed an appeal against the said conditional forfeiture order and s 84 HC order to the Court of Appeal.

[12] In the Court of Appeal, the court had made two findings:

(a) that the conditional forfeiture order be set aside and both forfeiture of land and bank accounts be remitted back to High Court for re-hearing by another High Court judge; and

(b) the dismissal of s 84 HC order be affirmed ('the COA decision').

[13] Being dissatisfied with the COA decision, the applicant filed an appeal to Federal Court. The appeal is yet to be heard.

[14] Meanwhile, the applicant filed the present stay application to stay the Court of Appeal order dated 23 November 2020 which affirmed the High Court's prohibitory order pending the disposal of the appellant's appeal in the Federal Court.

THE LAW ON STAY OF PROCEEDING

[15] The law on stay of proceeding is trite and settled. Reference can be seen in a plethora of authorities, amongst others are, *Kosma Palm Oil Mill Sdn Bhd & Ors v Koperasi Serbausaha Makmur Bhd* [2004] 1 MLJ 257, *Sharma Kumari a/p Oam Parkash v PP* [2000] 6 MLJ 847 and *Pendakwa Raya lwn Tetuan Wan Shahrizal, Hari & Co dan satu lagi* [2019] MLJU 1645; [2019] 1 LNS 1104.

[16] In *Kosma Palm Oil*, Augustine Paul JCA (as he then was) held that:

> (1) An appeal shall not operate as a stay of execution unless the court so orders. The paramount consideration governing an application for a stay of execution is that the appeal to this court, if successful, should not be rendered nugatory. If upon balancing all the relevant factors, this court comes to the conclusion that an appeal would be rendered nugatory without the grant of a stay or other interim preservation order, then it should normally direct a stay or grant other appropriate relief that has the effect of maintaining the status quo (para 7, 10).
>
> (2) There are many factors that may constitute special circumstances and the fact that an appeal would be rendered nugatory if the say was referred is the most common one ...

[17] Powers of the court to grant a stay of proceeding or execution is discretionary. In *Sharma Kumari a/p Oam Parkash*, it was held that:

> Obviously the court or the judge has a discretion. In my view, a stay of execution should not be granted and will not be granted by me unless there are special reasons

for so doing and the mere fact that a notice of appeal has been given is no sufficient reason.

[18] What then amount to special reasons or special circumstances? In this aspect, Ian Chin J (as his then was) in the case of *Government of Malaysia v Datuk Haji Kadir Mohamad Mastan and another application* [1993] 3 MLJ 514 had this to say:

> What, then, constitute special circumstances? It was said in Mohamad *Mohamed Mustafa v Kandasami (No 2)* [1979] 2 MLJ 126, at p127, that:
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> > One of the determining factors that calls for consideration is whether by not making an order of stay of the execution it would make the appeal if successful, nugatory in that it would deprive an appellant of the results of the appeal. How pertinent that factor would be may vary according to the circumstances of each particular case.

In *Smith, Hogg & Co Ltd v The Black Sea and Baltic General Insurance Co Ltd* (1940) 162 LT 11, Scott J said at p 12:

> The Court of Appeal has had to consider this question some t ime ago and decided that the practice on appeals to the House of Lords was that the stay of execution, pending such appeal, would not be granted save under very exceptional circumstances, such as for instance, where execution would destroy subject-matter of the action or deprive the appellant of the means of prosecuting the appeal.

In *Rosengrens Ltd v Safe Deposit Centres Ltd* [1984] Lexis Citation 219 Dillon LJ said:

> The most common special circumstances is, normally no doubt, that it would be doubtful whether, if the judgment was enforced, the defendant would get the money back if the appeal subsequently succeeded. But there are others as, for instance, if there is likelihood that the money the subject of the judgment, if paid over, would go to a foreign jurisdiction where the defendant would have difficulty recovering it.

[19] In a nutshell, the consideration put before this court is whether the refusal of stay would injure the interest of the applicant or the appeal is rendered nugatory if the stay is not granted.

THE APPLICANTS' SUBMISSION

[20] The learned counsel for the applicant in his submission had advanced the argument that if the stay is not allowed, the appeal in the Federal Court will be rendered nugatory.

[21] Besides, it will advance a chance to the respondent for a second bite at the cherry as the respondent had in his email dated 18 January 2021 stated that the execution of the said COA order will allow the respondent to rectify their earlier omissions and/or mistakes in the subject lands and the bank accounts.

[22] The appeal in the Federal Court concerns the violation of the applicant's constitutionality rights guaranteed under the Federal Constitution, particularly art 8 based on the respondent's earlier representation not to initiate any criminal prosecution against the applicant under the AMLA. As a result, this will destroy the whole substratum of the said s 84 High Court order.

THE RESPONDENT'S SUBMISSION

[23] The respondent, on the other hand, contended that the applicant had failed to prove any special circumstances which warrants the adjournment of the proceeding, that is the re-hearing in the High Court.

[24] One of the main arguments advanced by the respondent is that the decision or ruling of the High Court is not appealable. It is argued that the rights of the applicant before this court vis a vis the present appeal is governed by s 50 of the CJA.

[25] Section 50 of the CJA, provides that:

> 50 Jurisdiction to hear and determine the criminal appeals
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> (1) Subject to any rules regulating the proceedings of the Court of Appeal in respect of criminal appeals, the Court of Appeal shall have jurisdiction to hear and determine any appeal against any decision made by the High Court —
>
> (a) In the exercise of its original jurisdiction; and
>
> (b) In the exercise of its appellate or revisionary jurisdiction in respect of any criminal matter decided by the Sessions Court.
>
> (2) An appeal shall lie to the Court of Appeal with the leave of the Court of Appeal, against any decision of the High Court in the exercise of its appellate or revisionary jurisdiction in respect of any criminal matter decided by a Magistrate's Court but such appeal shall be confined to only question of law which have arisen in the course of the appeal or revision and the determination of which by the High Court has effected the event of the appeal or revision.
>
> (2A) ...
>
> (3) ...
>
> (4) ...

[26] The respondent cited the case of *Dato' Seri Anwar bin Ibrahim v Public*

Prosecutor [1999] 1 MLJ 321 on the meaning of 'decision' and s 50 of the CJA, which held as follows:

> A decision made pending the trial of the charges against the appellant is not, in our considered opinion, a decision (ruling) that had the effect of finally determining the rights of the appellant. It is only the outcome of the trial that would have the effect of finally disposing his rights.

[27] Accordingly, it is the respondent's submission that the High Court judge's ruling on the dismissal of the applicant's application on constitutional questions is a non-appealable ruling. Therefore, the application before this court is premature. It is further submitted by the respondent that ss 3 and 50(2) of the CJA preclude the Court from taking into account the leave to appeal to the Federal court is not a 'decision' that falls within the sphere of s 3 of the CJA.

See also *Saad bin Abas & Anor v Public Prosecutor* [1999] 1 MLJ 129, *Letchumanan a/l Suppiah v Public Prosecutor and another appeal* [2009] 5 MLJ 597; [2009] 5 CLJ 652.

[28] The Federal Court in the case of *Gan Boon Aun v Public Prosecutor* [2016] 4 MLJ 265 at p 227 held as follows:

> [21] We would to take the view that under s 30 of the CJA the High Court judge has to consider and decide whether there is a question of constitutional issue on matters referred to it by the sessions court necessary for the determination of the proceedings before the sessions court. If there is none the High Court judge must send the case back for continued hearing before the sessions court. On the other hand, if the High Court finds that a decision on a question as to the effect of a provisio of the constitution is necessary for the determination of the proceedings in the sessions court it is the duty of the High Court judge under s 84 to state the question which is in the opinion of the High Court judge had arisen as to the effect of the provision of the constitution in the form of a special case which shall permit of an answer being given in the affirmative or the negative. Once that is done, the High Court judge shall transmit the special case to the Federal Court in accordance with the Rules of the Federal Court.
>
> [22] It is to be stated here that nowhere in ss 30 and 84 of the CJA is the power given to the High Court judge to determine a question which concerns the effect of a provision of the constitution which had arisen in the subordinate court and in respect of which the record of proceedings have been transmitted to the High Court by the subordinate court under s 30 of the CJA. The power belongs to the Federal Court.

[29] At p 281, it was further held by the Federal Court that:

> We would like to state here and advise all sessions court judges and magistrates when dealing with any application made by any party under s 30 of the CJA to properly to ensure that there is merit in such application. It may be just a frivolous

application to delay the conduct of the hearing of the trial. If there is no merit in such application the case should proceed to a final conclusion of the trial. A trial should be conducted on a continuous basis without interruption and delay. A trial should not be by instalment. Likewise, High Court judges when presiding to deal with matters brought before them under s 30 of the CJA should act and decide promptly and judiciously whether there is merit in such application. If the matter referred to it does not relate to constitutional issue to be determined by the Federal Court, it should be sent back to the transmitting court for speedy disposal of the case.

THE ANALYSIS

[30] After hearing the submissions by both parties, the court must be satisfied that there must be special circumstances that warrant the stay of proceedings and what amounts to special circumstances are very much dependent on the factual backgrounds of each case.

[31] In the present motion, the applicant had only advanced the argument that if the stay is not granted, it will render the leave to appeal to the Federal Court nugatory or academic.

[32] With respect, we are not convinced with the contention of the applicant as the applicant had failed to convince us that any irreparable damages would be caused to the applicant if the stay is not granted.

[33] In *Public Prosecutor v Dato' Sri Mohd Najib bin Hj Abd Razak* [2019] 4 MLJ 421, the Federal Court had expounded on the determinative principles in the stay application of the criminal proceedings, that:

> [32] In summary, in considering an application for stay of criminal proceedings when commencement of the trial is imminent or continuing in the court in first instance, the determinative principles to be derived from the above cases are as follows:
>
> 1. There is a strong public interest in the prosecution of crime and in ensuring that those charged with serious criminal offences are tried.
> 2. It is undesirable that the criminal process be interrupted or fragmented by interlocutory proceedings. The consideration of public interest are of great weight leaning in favour of expeditious resolution of accusation of crime.
> 3. The undesirability of fragmenting the criminal process is not confined to any particular part of the criminal process, but rather to the process as a whole. Any interference with any part of the process is antithetical to the proper and just disposition of criminal cases. The caution about the undesirability of fragmentation of criminal process would be more pronounced where a hearing of proceedings has actually commenced ...

[34] Guided by principle in the aforesaid case, it is the considered view of this court that the applicant's motion does not fit with the principle expounded by the Federal Court.

[35] The applicant had also been unable to satisfy this court that the criminal proceedings are likely to be undisturbed by the interlocutory applications.

[36] The criminal proceeding in the instant case, as a matter of fact, is as ordinary as any other criminal proceedings.

[37] It is noteworthy to mention that the prohibitory order was granted by the High Court in order to prohibit the applicant from dealing with the lands and the monies in the banks particularly they are the subject matters in the proceedings. It is only fair and just for the court to order so.

[38] In addition, the applicant had failed to convince us on how the trial, if proceeded would prejudice or cause miscarriage of justice to the applicant.

[39] Conversely, in the interest of time and cost, it is only right to continue the proceedings.

[40] In the upshot, we unanimously find that there is no merit in the motion. The application is dismissed.

Application dismissed.

Reported by Ashok Kumar